Filed 12/12/08 Kruse v. McLaughlin CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARK KRUSE et al., Plaintiffs and Appellants, v. JENNIFER K. MCLAUGHLIN, Defendant and Respondent.	G039240 (Consol. with G039880) (Super. Ct. No. 04CC08367) O P I N I O N
MARK KRUSE et al., Plaintiffs, v. KYLE HAYDEN et al., Defendants.	(Super. Ct. No. 06CC08155)

Appeals from a judgment and postjudgment order of the Superior Court of Orange County, Derek W. Hunt, Judge. Reversed. Motion to augment record. Denied as moot.

Law Offices of Michael J. Rand and Michael J. Rand for Plaintiffs and Appellants.

Stradling Yocca Carlson & Rauth and Donald J. Hamman for Defendant and Respondent.

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I.

INTRODUCTION

Mark Kruse and Susan C. Kruse (the Kruses) appeal from a judgment entered after the trial court granted the motion of Jennifer K. McLaughlin to dismiss the Kruses' complaint under Code of Civil Procedure section 581 (all further code references are to the Code of Civil Procedure). The Kruses also appeal from a postjudgment order awarding McLaughlin contractual attorney fees and costs based on section 998.

For reasons we explain, we reverse the judgment and remand. Because we reverse the judgment on which attorney fees and costs were awarded, we also reverse the order awarding attorney fees and costs. (*Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403, 1436.)

II.

FACTS AND PROCEDURAL HISTORY

A. *The Complaint*

In June 2002, the Kruses purchased a single-family residence from McLaughlin. Escrow closed in July 2002.

On August 9, 2004, the Kruses filed a complaint against McLaughlin for breach of contract, fraud, and negligent misrepresentation. The complaint alleged that a hardwood floor was not installed in a workmanlike manner, and that McLaughlin failed to disclose 13 material facts regarding the property. Among these, the complaint alleged

McLaughlin failed to disclose that "[n]o building permits were obtained for the guest house."

The purchase agreement included a clause requiring the parties to mediate "'any dispute or claim arising between them out of this agreement, or any resulting transaction, before resorting to arbitration or court action.'" The complaint alleged: "Simultaneously with the filing of this Complaint, the Plaintiffs have demanded that Defendant McLaughlin submit the disputes set forth herein to mediation, pursuant to paragraph 17A of the [purchase] Contract. The Plaintiffs are filing this Complaint at this time for the sole purpose of preventing the running of any statutes of limitation, and do not intend the filing of this Complaint to be construed as an indication that they are not willing to submit these disputes to mediation."

B. *Mediation and Nonbinding Arbitration*

The initial trial date was October 24, 2005. On October 4, 2005, the parties stipulated to continue the trial date to March 6, 2006 to allow the parties to participate in the mediation required by their contract. Mediation was conducted in November 2005 and was unsuccessful.

On January 31 or February 1, 2006, McLaughlin produced 1,467 pages of documents. The Kruses' attorney moved to exclude the documents from trial, claiming the documents identified several material witnesses whose depositions were necessary for trial preparation.

On February 17, 2006, the parties stipulated to nonbinding arbitration. The arbitration was conducted on July 31 and August 1. Before the arbitration commenced, the Kruses' attorney informed McLaughlin's attorney the Kruses "were limiting their claims in the case at bar to the guest house: it was converted from a tack room to a guest house without building permits, and it encroached into the side yard set back." In their arbitration brief, the Kruses stated they had filed a separate action against the contractors

who had performed the allegedly defective work on the property, and, therefore, "the only claims being asserted against the Seller in this arbitration are the claims based upon the Seller's failure to disclose the defects of which she was aware concerning the guest house." On July 18, 2006, the Kruses sued the contractors in a separate complaint, *Kruse v. Hayden* (Super. Ct. Orange County, No. 06CC08155).

At the commencement of the arbitration, the Kruses moved for an order permitting them to amend the complaint "to delete all claims except those arising out of the guest house, and to add a claim that the guest house encroaches into the side yard set back." The arbitrator granted the motion.

The arbitrator issued an award granting McLaughlin $197,809.60 in attorney fees and $24,754.27 in costs. The arbitrator found McLaughlin breached the purchase contract by not disclosing the guest house encroached on the side yard setback. The arbitrator made an award in McLaughlin's favor, however, because he found the Kruses failed to prove damages. The Kruses requested a trial de novo.

C. *Ex Parte Application for Leave to File Amended Complaint*

On November 6, 2006, the Kruses filed a case management statement with this description of the case: "Plaintiffs purchased the single family home at 26521 Broken Bit Lane, Laguna Hills, from Defendant McLaughlin. Defendant McLaughlin failed to disclose defects in the property which were known to her, including without limitation the facts that a guest house had been converted from a barn without building permits, and that it encroached into a side yard setback."

On November 17, 2006, the trial court set a new trial date of April 2, 2007. On February 23, 2007, the Kruses filed a motion to augment their expert witness list to add a real estate appraiser. The trial court denied the motion on March 20, 2007.

On March 27, the Kruses submitted an ex parte application for an order granting them leave to file a first amended complaint. The proposed first amended

complaint limited the Kruses' claims to an alleged failure to disclose: "A. No building permits were obtained for the conversion of the guest house from a barn into the guest house; [¶] B. The guest house encroached into the side yard set back." On the same day, the trial court denied the ex parte application.

Also on March 27, the Kruses' attorney sent a letter to McLaughlin's counsel (the March 27 Letter), stating: "To eliminate any possibility of misunderstanding, the case that the Plaintiffs will present at the trial of this case is the same case that was presented at the arbitration, and the same case that is reflected in the proposed First Amended Complaint that was faxed to you several weeks ago, and which was the subject of the ex parte application this afternoon. [¶] The only claims that will be presented will be those pertaining to the guest house, specifically, that it was converted from a barn to a guest house without building permits, and that it encroaches into the side yard set back. [¶] None of the other claims alleged in the Complaint, including the claims pertaining to the hardwood flooring, will be presented at the trial of this case, because they are the subject of the separate action against the contractors."

On April 2, the trial court vacated the trial date and set a hearing on McLaughlin's order to show cause for sanctions against the Kruses' counsel for not filing a notice of related cases after filing the lawsuit against the contractors.

D. *Motion to Dismiss*

McLaughlin filed a motion to dismiss the complaint pursuant to section 581. McLaughlin sought dismissal on the ground that in the March 27 Letter, the Kruses "abandoned" the claims alleged in the complaint by announcing their intent to proceed to trial "only with 'the same case that is reflected in the First Amended Complaint.'"

The Kruses opposed the motion to dismiss and filed a noticed motion for leave to file a first amended complaint. They argued they "have not 'clearly and

unequivocally' expressed their desire to abandon the case . . . by indicating that they will limit their claims against Defendant McLaughlin to only certain defects."

At the hearing on the motion to dismiss, the trial court stated, "I don't see how any sensible judge could regard [the March 27] letter as anything other than an abandonment of those prior claims . . . . It's an abandonment." The court granted the motion and dismissed the Kruses' complaint with prejudice. An order of dismissal was entered on the same day.

E. *Motion for Attorney Fees and Costs*

McLaughlin filed a motion seeking $305,578.77 in attorney fees and $41,382.99 in costs. McLaughlin sought attorney fees pursuant to the purchase agreement and on the ground she prevailed at arbitration from which the Kruses requested a trial de novo. She sought costs on the ground the Kruses rejected two settlement offers made pursuant to section 998 and on the ground the Kruses denied requests for admission.

The Kruses opposed the motion for attorney fees and costs on the ground, among others, that McLaughlin had unreasonably delayed in participating in mediation and undermined the mediation process by not producing in a timely fashion some 1,500 pages of documents.

The trial court granted the motion and awarded McLaughlin $205,492 in attorney fees and the full amount of costs.

F. *Appeal*

The Kruses filed a notice of appeal from the order of dismissal and the order for attorney fees and costs. That appeal was assigned case number G039240. The Kruses also filed a notice of appeal from the judgment entered several months later. That appeal was assigned case number G039880. The two appeals have been ordered consolidated for all purposes.

III.

DISCUSSION

A. *Denial of Leave to Amend*

The trial court denied the Kruses' ex parte application to file a first amended complaint, which would have asserted only claims based on allegations the guest house was converted from a barn without building permits and the guest house encroached into the side yard setback. We will uphold a trial court ruling denying leave to amend a complaint unless "'a manifest or gross abuse of discretion is shown.'" (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) Delay in seeking amendment is itself a valid reason to deny leave to amend. (*Ibid.*)

In this case, the trial court did not abuse its discretion in denying the Kruses' ex parte application for leave to amend, brought just a few days before the scheduled trial date. The Kruses did not adequately explain the reasons, if any, for waiting until a few days before trial to seek leave to amend. In addition, McLaughlin showed she would suffer prejudice from an amended complaint because it would have required her to defend an issue (guest house encroachment into the side yard setback) not pleaded in the complaint.

B. *Motion to Dismiss*

The trial court construed the March 27 Letter as an abandonment of the complaint and granted McLaughlin's motion to dismiss pursuant to section 581, subdivision (d), which reads: "Except as otherwise provided in subdivision (e), the court shall dismiss the complaint, or any cause of action asserted in it, in its entirety or as to any defendant, with prejudice, when upon the trial and before the final submission of the case, the plaintiff abandons it."

"Although this ineptly worded statute appears to grant to the court a power to dismiss, the reported cases interpreting it have all preceded on some affirmative action

by the plaintiff in abandoning his cause of action." (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 312, p. 767.) Witkin's observation is based soundly on well-settled case law. "In other words, section 581, subdivision 4 [now subdivision (d)] has traditionally been a mechanism by which a plaintiff (*and not the court*) voluntarily dismissed an action which has been expressly and intentionally abandoned. [¶] We hold that the provisions of section 581, subdivision 4 provide for a voluntary dismissal which must be predicated upon a clear, unequivocal and express intent to abandon an action. Such intent must be demonstrated to the court by way of a motion to dismiss, stipulation of the parties or some other form of express intent on the record." (*Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co.* (1970) 10 Cal.App.3d 206, 213 (*Kaufman & Broad*).)

In *Kaufman & Broad, supra,* 10 Cal.App.3d at page 212, the trial court directed a verdict based on its conclusion under section 581, former subdivision (4) that the plaintiff had abandoned its second cause of action. The trial court reached that conclusion from statements made by the plaintiff's counsel during an in-chambers conference, suggesting the plaintiff "'*might*' wish to abandon his second count at a future time." (*Kaufman & Broad, supra,* 10 Cal.App.3d at p. 213.) The Court of Appeal reversed, concluding "[t]he record is devoid of any statement that could be mistaken for an unequivocal and voluntary motion to dismiss which demonstrated to the court an express intent to abandon plaintiff's 'Second Cause of Action.'" (*Ibid.*) Counsel's in-chambers statements were "at best" ambiguous, the court reasoned, and "[s]ection 581, subdivision (4) was not intended to permit the court to make an independent judgment as to whether the plaintiff has abandoned his cause of action." (*Id.* at pp. 213, 214.)

Section 581, subdivision (d) was inapplicable here for several reasons. First, section 581, subdivision (d) permits dismissal "when upon the trial and before the final submission of the case," the plaintiff abandons the case. Here, trial had not yet commenced when the trial court granted McLaughlin's motion to dismiss. Second, the

Kruses' opposition to McLaughlin's motion to dismiss demonstrates dismissal was not in the least voluntary.

Third, and most importantly, the March 27 Letter cannot be construed as "a clear, unequivocal and express intent to abandon" the complaint. The March 27 Letter states, "[t]he only claims that will be presented will be those pertaining to the guest house, specifically, that it was converted from a barn to a guest house without building permits, and that it encroaches into the side yard set back." While the encroachment issue was not raised in the Kruses' complaint, the guest house issue was. The complaint alleged McLaughlin failed to disclose that "[n]o building permits were obtained for the guest house."

McLaughlin argues the complaint refers only to initial building permits for the barn, not building permits for conversion of the barn to the guest house. The complaint must be construed liberally, as in the analogous situation of judgment on the pleadings. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515-516 [court liberally construes complaint on appeal from judgment on the pleadings].) Liberally construed, the Kruses' complaint encompasses both the claim McLaughlin failed to disclose the lack of initial building permits for the barn, and the claim McLaughlin failed to disclose the lack of building permits for converting the barn to a guest house. Thus, the March 27 Letter, which expressed the Kruses' intent to proceed on the latter claim, could not have constituted an abandonment of the complaint—unequivocal or otherwise.

McLaughlin argues, "[n]owhere in discovery, expert designations, depositions, letters, or anywhere else did [the Kruses] identify that it was permits for repairs or modifications rather than the original building permits which were missing." McLaughlin offers no citations to the record to support that assertion, so we deem it waived. (See California Rules of Court, rule 8.204(a)(1)(C); see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 9:36, p. 9-11 (rev. #1, 2006.) Nonetheless, none of those things—discovery, expert designations,

depositions, or letters—would constitute "a motion to dismiss, stipulation of the parties or some other form of express intent on the record" to abandon the complaint. Section 581, subdivision (d) did not require the Kruses to specifically advise the court of an intent to proceed to trial on the complaint. (*Kaufman & Broad, supra,* 10 Cal.App.3d at p. 214.) If McLaughlin believed the Kruses could not or would not produce evidence at trial to support the allegations of the complaint, then her recourse would be to bring a motion for summary judgment, or a motion for nonsuit or other appropriate motion during trial.

McLaughlin also argues the Kruses were "on notice" of the lack of building permits for the guest house, did not ask about permits during escrow, and cannot prove damages for the alleged failure to disclose the lack of permits for the guest house. Those arguments go to merits of the failure to disclose allegations, and are irrelevant to whether the Kruses abandoned the complaint.

McLaughlin also based her motion to dismiss on section 581, subdivision (m), which states: "The provisions of this section shall not be deemed to be an exclusive enumeration of the court's power to dismiss an action or dismiss a complaint as to a defendant." The trial court dismissed the complaint solely on the ground of abandonment and provided no other justification. While McLaughlin cites section 581, subdivision (m) in her respondent's brief, she argues only that the Kruses abandoned the complaint. A trial court has inherent power to dismiss a complaint when (1) the plaintiff has failed to prosecute or (2) the complaint has been shown to be "'fictitious or sham' such that the plaintiff has no valid cause of action." (*Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 915.) Neither is the case here.

C. *Attorney Fees and Costs*

The trial court awarded McLaughlin attorney fees as the prevailing party in an action on the purchase agreement, which included an attorney fees clause. The trial

court also awarded McLaughlin costs under section 998 because she made a pretrial offer that was greater than the amount of the Kruses' recovery.

Because we reverse the judgment on which attorney fees and costs were awarded, we also reverse the postjudgment order awarding attorney fees and costs. (*Metropolitan Water Dist. v. Imperial Irrigation Dist., supra*, 80 Cal.App.4th at p. 1436.) McLaughlin moved to augment the record to include the exhibits submitted with her motion for attorney fees and the supplemental declaration and exhibits filed in connection with the motion. The motion to augment the record is denied as moot.

DISPOSITION

The judgment and the postjudgment order awarding attorney fees and costs under section 998 are reversed. The matter is remanded for further proceedings. Appellants to recover costs incurred on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.